United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

16-4

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BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,533

EARL L. BRIGHT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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WFO 87-14657—

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether it was error for the trial court to deny appellant's request for release on personal recognizance made during trial without any detailed information concerning appellant or any consideration of the non-monetary conditions set forth in 18 U.S.C. § 3146(a), when it was necessary for appellant to assist counsel in locating the only defense witness in Baltimore, and when appellant had been surrendered by a professional bondsman on the day before trial.

2. Whether it was error for the trial court to fail to make any determination of the nature of appellant's proposed testimony when appellant had decided not to take the stand in his own behalf for fear that he would be impeached by his prior conviction for false pretenses, pursuant to the ruling in Gordon v. United States, ___ U.S. App. D.C. ___, 383 F.2d 936 (1967).

This case has never been before this Court previously, either under this name or any other.

STATEMENT OF THE CASE

This is an appeal from convictions in the United States District Court for the District of Columbia (Criminal No. 1294-66) after verdicts of guilty by a jury on each of two counts of forgery and two counts of uttering in violation of D.C. Code § 22-1401, and one count of interstate transportation of forged security (check) in violation of 18 U.S.C. § 2314.

The first three counts of the indictment, which was filed on November 21, 1966, charged the appellant, Earl L. Bright, with forgery, uttering and interstate transportation, occurring on September 29, 1966, and the fourth and fifth counts charged forgery and uttering on September 30, 1966. After the verdicts of guilty on July 31, 1967, appellant was sentenced to two to six years imprisonment on October 13, 1967, on each of the five counts of the indictment, the terms to run concurrently.

On July 28, 1967, the case was called for trial in the United States District Court for the District of Columbia before the Honorable Howard F. Corcoran and a jury.

The first Government witness was Mrs. Isabel Strawderman, who was employed as a teller at the Liberty Branch of the National Bank of Washington at Fifteenth and I Streets, N.W., on September 29, 1966 (Tr. 4-5).

Mrs. Strawderman testified that on September 30, 1966, appellant brought a check, identified as Government's Exhibit No. 1, to her window to be cashed. She told appellant that the check would have to be approved by an officer of the bank. She said

that appellant then went to and sat at the desk of Mr. Robert W. Crandell, Vice President of the Bank (Tr. 5-7).

About five minutes later, according to Mrs. Strawderman's testimony, appellant brought the check back to her and she cashed it, turning over $705.00 to appellant. She stated that the check bore the initials "[illegible]C", which she believed at the time to be the initials of Mr. Crandell (Tr. 8-9).

On September 30, 1966, the following day, Mrs. Strawderman said that appellant returned to the Bank and went to the teller next to her, a Miss Schlosser (Tr. 10-12). Miss Schlosser asked the witness on which bank the forged check was drawn. Mrs. Strawderman testified that when she replied Baltimore, she associated the man facing Miss Schlosser with the check she had cashed (Tr. 11).

According to Mrs. Strawderman, appellant then went to Mr. Crandell's desk and returned with the check approved. When Miss Schlosser went to get Mr. Lewis, the head teller, appellant left the bank through the back door (Tr. 12-13).

On cross-examination, Mrs. Strawderman admitted that about 500 customers come to her window each day, but that she was able to identify appellant as the person who appeared in the bank with a forged check on each day in question (Tr. 14-20).

At a bench conference, the Government agreed, at defense request, to produce a photograph of appellant showing him without a beard (Tr. 21-23). Mrs. Strawderman had testified that appellant had a beard when he was arrested (Tr. 21).

The next Government witness was Miss Mary Schlosser, also employed as a teller at the National Bank of Washington (Tr. 23-24)

Miss Schlosser testified that on September 30, 1966, appellant presented a check, identified as Government exhibit No. 2, to her to be cashed. She then directed appellant to an officer for approval of the check. When appellant returned to her window, Miss Schlosser stated that the check bore the initials "RNC". Miss Schlosser testified that Mr. Crandall had ordered her not to cash any checks bearing his initials (Tr. 25-26).

Miss Schlosser stated that she went to Mr. Crandall to verify his initials, but he was not at his desk (Tr. 27). As she was returning to her window, she said she saw appellant leaving through the back door (Tr. 27). She then informed the head teller, Mr. Lewis, who ran out the door after appellant (Tr. 27-28).

According to Miss Schlosser, appellant was brought back to the bank a few minutes later by the police and she was asked if appellant was the man she seen earlier (Tr. 28). On cross-examination, Miss Schlosser described appellant's clothing on the day he was arrested (Tr. 30).

The next witness, Mr. Harry Baernstein, III, identified Government's exhibit No. 2 as a check from a firm with which he was once associated (Tr. 31-32). He stated that the signature on the check, "Hyman Goldstein", was not that of anyone associated with the firm or having authorization to sign checks (Tr. 32-33).

At this time, counsel for appellant made the following statement to the Court:

"MR. WOODY (counsel for appellant): Your Honor, my defendant who was on bond and two weeks ago this coming Monday was asked to come over here to trial, and he comes from Baltimore. He had been working up there and had gotten up here every time until last Wednesday. Wednesday he happened to be in Baltimore and held incommunicado and he wasn't able to get here in the morning. They later turned him loose. In the meantime, he didn't get here in time, too, the next day. I didn't know this until this morning. His bond was revoked and he was put in jail down here.

* * *

"THE COURT: All right. Go ahead, Mr. Woody. I think we have most of your request on the record. What were you going to add?

"MR. WOODY: I was going to ask that his bond be reinstated, Your Honor. He happens to be able to bring a witness which I need badly, and I don't think I can find the witness myself in Baltimore. As it is now, I don't think I can find this witness to bring her here Monday.

"If he is able to go back on bond, he will bring her here, he tells me.

"THE COURT: I assume he can make bond.

"MR. WOODY: He has already been on bond, Your Honor.

"THE COURT: I assume he has got the cash money to put up a bond.

"THE DEFENDANT: I had a cash bond and I wasn't able to get over one day but I called the bondsman and I told him I would be here the next day, and the next day when I came in he surrendered my bond. I explained to the Judge what had happened, that it was impossible for me to get here the day before. The Judge said, Okay, we will see if this can be corroborated and if it can, we will let you out on bond; but the bondsman surrendered me.

"the only way I could possibly go on bond now would be on personal bond.

"MR. WOODY: He has had no trouble whatsoever in the nine or ten months since he has been on bond, Your Honor.

"THE COURT: I know, but he doesn't belong in our community, that's my problem and we are right in the middle of a trial. I will reinstate the cash bond for $1500 that he had before, but I am not going to put a stranger to this community out on personal recognizance. He has no ties to the community.

"MR. WOODY: Your Honor, I understand that but it's going to be difficult for me to find this witness.

"THE COURT: I don't know what to do about it. This is a stranger to the community. Nobody in Washington knows him. I haven't any assurance he will come back. We have a long weekend now coming up.

"THE DEFENDANT: Your Honor, I came over each day on the bus.

"THE COURT: I know, but you were on bond at the time. Now, you are asking me to let you go free. At that time, you had a bondsman speaking for you. He had means of keeping in touch with you and he could bring you in. I don't have any means of keeping in touch with you.

"THE DEFENDANT: Doesn't personal bond mean there is some liability? Isn't there some fine or penalty attached to it?

"THE COURT: Yes, there is. It still doesn't do me any good in the middle of a trial if you don't show up.
I will reinstate the bond that he had before; but he is a stranger in the community and we are in the middle of a trial, I can't take a chance that he will be back. We have a long weekend ahead of us.

No further inquiry was made into the appellant's bond during the trial, and no witnesses appeared in behalf of the appellant.

The Government's case resumed with Robert W. Crandell, Assistant Vice President of the National Bank of Washington (Tr. 38). He testified that the initials "RWC" on the check identified as Government's exhibit No. 1 were not written by him. He said the check was mailed in the normal course of business to the Maryland National Bank in Baltimore for payment, but was returned unpaid (Tr. 39-40). He also stated that he did not write the initials "RWC" on the check identified as Government's exhibit No. 2 (Tr. 43).

The trial was then adjourned until July 31, 1968. (Tr. 46)

John O. Montgomery of the Maryland National Bank testified that

the check identified as Government's exhibit No. 1 was received at his bank in Baltimore on September 30, 1966, but was returned to the National Bank of Washington because the signature on the check did not correspond with the signature on file in the Baltimore bank (Tr. 52-56).

Mr. Wilbert C. Lewis, head teller of the Liberty Branch of the National Bank of Washington, testified that on September 30, 1966, he and other individuals, including two police officers, pursued appellant after he had run from the bank (Tr. 58). Appellant allegedly escaped from his pursuers for a few moments but was later arrested in a taxi after an unidentified bystander had pointed him out as the man whom they had been chasing (Tr. 59-60). Appellant was then brought back to the bank and identified by various witnesses (Tr. 60).

Officer Cornelius Francis Sullivan of the Metropolitan Police Department testified that he joined in the chase after he noticed Mr. Lewis pursuing appellant (Tr. 65-66). He said he lost sight of appellant for a few minutes, but later arrested appellant in a taxi at 15th and H Streets (Tr. 66-67).

The Government then, without objection, introduced into evidence the two checks and rested its case. (Tr. 70)

Defense counsel then approached the Bench and requested a Luck[1/] hearing, invoking the Court's discretion as to whether or not appellant could testify unimpeached by evidence of prior criminal convictions. (Tr. 70-71)

1/ Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); D.C. Code § 14-305 (1967).

The following discussion ensued concerning the Luck question:

"MR. WOODY: I would like to speak to Your Honor about the defendant's past record.

"Under Luck versus the United States, I would like to have his past record kept out if possible.

"I have no other witnesses. I only have the defendant and under this circumstance, I would like to put him on the stand.

"THE COURT: What is his past record?

"MR. ALPRIN (counsel for the Government): It is extensive. Shall I bring it up?

"THE COURT: Yes. If there are any crimes of the same nature, of course, they would go to credibility and would be admissible.

"MR. WOODY: None are of the same nature.

"THE COURT: There is nothing that goes to credibility, like forgery?

(Document was handed to the Court.)

"THE COURT: (Reading) Larceny; false pretenses; forgery -- or is that this one?

"MR. ALPRIN: That is this one, Your Honor.

"THE COURT: There are just three there, I believe.

"MR. ALPRIN: I wouldn't ask to use all of them but I would ask to use the false pretenses.

"THE COURT: On the larceny, I don't know what this notation means.

"MR. ALPRIN: I think only the ones with X's are convictions.

"THE COURT: What is "RWD"?

"MR. ALPRIN: Robbery with a dangerous weapon, and it was in Maryland, I believe. I would only ask to use the false pretenses.

"THE COURT: I think I will limit it to the false pretenses which definitely goes to credibility.

"MR. WOODY: All right, Your Honor. (Tr. 70-72)

* * *

"THE COURT: Are you going to put him on the stand?

"MR. WOODY: Yes, I am.

"THE COURT: I want the record to indicate that you have talked to him and explained to him what his rights are and the consequences of his taking the witness stand.

"MR. WOODY: After I talk to him, would you ask him, Your Honor?

"THE COURT: I just want you to indicate for the record whether you have done it, whether he understands his rights and so forth.

"MR. WOODY: Yes. (Tr. 73-74)

* * *

"(In open court:)

"(Counsel conferred privately with the defendant.)

"MR. WOODY: Your Honor, may we approach the Bench?

"THE COURT: Surely.

"(At the Bench:)

"MR. WOODY: The defendant does not want to take the stand with the charge of false pretenses against him. He feels that will be prejudicial.... (Tr. 74-75)

* * *

"THE COURT: I do think false pretenses definitely goes to credibility.

"MR. ALPRIN: That is all I would use, Your Honor.

"THE COURT: If you want to waive it, I don't care.

"MR. ALPRIN: The record should indicate that this man has two other convictions, one for narcotics and the other for robbery, and that the Court and myself have exercised the discretion to limit impeachment to one out of the three convictions which happened in 1964.

"THE COURT: And false pretenses goes to credibility. He has a couple convictions for soliciting prostitution too.

"MR. ALPRIN: Yes. I think that is earlier.

"THE COURT: Very well." (Tr. 76-77)

Defense counsel then introduced into evidence a police photograph of the appellant, taken at the time of his arrest, which apparently conflicted with the descriptions given by certain Government witnesses (Tr. 72-73, 75-77).

After some discussion about possible jury instructions, the defense rested (Tr. 79). Closing arguments were then made by both sides and the Court charged the jury. Neither counsel expressed any objection to the instructions (Tr. 83-99, 100).

After deliberating, the jury returned with verdicts of guilty on all five counts of the indictment (Tr. 101-02).

ARGUMENT

THE TRIAL COURT FAILED TO MAKE ADEQUATE INQUIRY OR TO CONSIDER IMPOSITION OF CONDITIONS OF RELEASE BEFORE DENYING APPELLANT'S REQUEST FOR PERSONAL BOND DURING TRIAL TO ALLOW HIM TO OBTAIN A NECESSARY WITNESS.

The constitutional[1] and statutory[2] right of an accused to bail pending trial in a federal non-capital case is without question.

The advantages to a defendant of pre-trial freedom are many: he is able to cooperate and assist his lawyer in the preparation of his defense; he is able to maintain employment and to support himself and his family; and he is able to avoid unnecessary detention should the case end without conviction or imprisonment.[3]

Yet to an accused who is unable to obtain his freedom because of poverty or the refusal of a bondsman to offer security, these rights and benefits must seem indeed empty.

1/ The Eighth Amendment to the Constitution states: "Excessive bail shall not be required,..."

2/ The Bail Reform Act of 1966, 18 U.S.C. § 3146, et seq., 80 Stat. 214 (1966). Rule 46(a)(1) of the Federal Rules of Criminal Procedure states:

> "A person arrested for an offense not punishable by death shall be admitted to bail...."

3/ There is evidence that the failure to obtain pre-trial release may be directly proportional the rate of convictions. See, The Effect of Pretrial Detention, 39 N.Y.U.L. Rev. 641 (1964).

In this case, appellant had been surrendered by a bondsman on the day before trial apparently because he did not appear in the courthouse on the previous day to await trial while his case was on "30-minute alert". The only explanation for appellant's alleged absence on that day was his attorney's assertion that he was "held incommunicado" in Baltimore (Tr. 34). His attorney was unaware of the situation until the morning of trial (Tr. 34). During the afternoon of the first day of trial, defense counsel made the following request:

> "MR. WOODY: I was going to ask that his bond be reinstated, Your Honor. He happens to be able to bring a witness which I need badly, and I don't think that I can find the witness myself in Baltimore. As it is now, I don't think I can find this witness to bring her here Monday.
>
> "If he is able to go back on bond, he will bring her here, he tells me." (Tr. 35)

The trial court reinstated appellant's $1,500 cash bond, but failed to make any further inquiry into appellant's background; the circumstances of his surrender the previous day; or the identity, whereabouts or prospective testimony of the missing witness from Baltimore.

This Court has recently emphasized the importance of a fully informed decision by a judicial officer when ruling on bond matters. In Wood v. United States, ___ U.S. App. D.C. ___, 391 F.2d 981, 982 (1968), this Court remanded for a determination of whether Wood had abided by conditions imposed upon him in previous criminal proceedings (12 in 13 years) and observed:

> "(T)he record is silent as to whether appellant was on conditional release and appeared voluntarily in those proceedings. It is that silence which troubles us."

The Bail Reform Act of 1966, 18 U.S.C. § 3146(d), requires that the judicial officer originally setting conditions of pre-trial release must upon request state his reasons in writing for not changing the original conditions if the applicant has not been able to comply with the conditions after the passage of 24 hours. In interpreting this provision of the Act, this Court has held that the written reasons are a prerequisite for further relief. Shackleford v. United States, 127 U.S. App. D.C. 285, 383 F.2d 212 (1967); Grimes v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 21,371, decided November 15, 1967, opinion rendered November 27, 1967).

Congress has also recognized the necessity for providing detailed information to assist the courts in this jurisdiction in making informed decisions on bail matters. The District of Columbia Bail Agency Act, D.C. Code § 23-901, et seq., 80 Stat. 327-29 (1966), establishes a public agency to furnish information to judicial officers in the District of Columbia concerning individuals "detained pursuant to law or charged with an offense." The Act contains a specific mandate that:

> "A judicial officer in making a bail determination shall consider the agency's report and its accompanying recommendation, if any." (emphasis added) D.C. Code § 23-903(e)

The record in this case, however, is notable for its absence of any on-the-record information concerning the defendant's eligibility for release on personal recognizance or relating to the possible witness. There is nothing in the record of this case also to indicate the the trial court had available or considered any Bail Agency report.

Similarly, there is no indication in the record that the trial court considered any of the non-monetary conditions set forth in 18 U.S.C. 3146(a). This provision of the Bail Reform Act allows the judicial officer, if he finds that unsecured personal recognizance will not "reasonably assure" the presence of the person at trial, to impose, in order, the following conditions:

> "(1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> "(2) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> "(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> "(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
>
> "(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours."

In this case, the trial court made no inquiry as to whether any person might be willing to assume custody of appellant during the day time hours so that they could have searched for the missing witness. In Black v. United States, No. 21,102, decided by Order filed June 30, 1967, this Court issued the following Order:

> "FURTHER ORDERED by the court that this case be remanded to the District of Columbia Court of General Sessions with directions to release petitioner to the custody of his counsel for such reasonable periods of time as that court may deem appropriate for the purpose of locating and interviewing potential defense witnesses in this case, 18 U.S.C. § 3146(a)(5),..."

It may be significant that in Black the petitioner was from Baltimore and had no contacts in the Washington area.

Both the House and Senate Reports accompanying the Bail Reform Act specifically directed how and in what order the conditions listed in Section 3146(a) were to be applied:

> "In determining which additional release condition or combination of conditions should be imposed, the judicial officer is required to consider them in the order in which they are set forth in the bill....
>
> "(T)he judicial officer can require the execution of an appearance bond and the deposit to the court of 10 percent of the amount of such bond...or require the execution of an ordinary bail bond with sufficient sureties or the deposit of cash in lieu of sureties... only if he determines that no combination of the enumerated nonfinancial conditions of release will reasonably assure appearance as required." Sen. Rep. No. 750, 89th Cong., 1st Sess., (1965), p. 11.

In this case, the trial court should have carefully complied with the mandate of 18 U.S.C. 3146(a), particularly in view of the representation of defense counsel that appellant's release was necessary so that he could locate an essential witness in Baltimore.

The House and Senate Reports recognized the danger of pre-trial incarceration in the preparation of a defense:

> "Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with his family, his attitude toward social justice, the outcome of the trial, and the severity of the sentence. For example, in preparation for his trial, the defendant who remains in jail does not have the same access to his counsel as the man free on bail. He is limited in his ability to collect witnesses for his defense." H.R. Rep. No. 1541, 89th Cong., 2nd Sess., (1966), p. 9.

In both cases of Bandy v. United States, 5 L. Ed.2d 218, 81 S. Ct. 197 (1960 Opinion of Mr. Justice Douglas as Circuit Justice), and 7 L. Ed.2d 9, 82 S. Ct. 11 (1961 Opinion of Mr. Justice Douglas as Circuit Justice), similar language is found:

> "Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel...."

This Court has criticized the practice of allowing the bondsman to hold the keys to the jail in their pockets. Pannell v. United States, 115 U.S. App. D.C. 379, 320 F.2d 698 (1963) (Wright, J., concurring); McCoy v. United States, 123 U.S. App. D.C. 81, 357 F.2d 272 (1966). In this case, the bondsman who surrendered appellant on the day before trial held the key to appellant's defense in his pocket.

In Stack v. Boyle, 342 U.S. 1, 4 (1951), it was held that:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

THE TRIAL COURT ERRED IN NOT MAKING ANY DETERMINATION AS TO WHAT APPELLANT'S TESTIMONY MIGHT BE BEFORE RULING THAT APPELLANT COULD BE IMPEACHED BY A PRIOR CONVICTION, THEREBY PREVENTING APPELLANT FROM TAKING THE STAND.

In Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), this Court held that the Government's impeachment of the defendant by showing prior criminal convictions was a matter for the discretion of the trial judge. The Court enumerated four criteria relevant to the exercise of that discretion: (1) the nature of the crimes; (2) the length of the defendant's record; (3) the age and circumstances of the defendant; and (4) the extent to which the

desirability of the defendant's taking the stand outweighs the value of the jury's knowing of his prior convictions.

In a subsequent elaboration of the Luck standards, this Court in Gordon v. United States, ___ U.S. App. D.C. ___, 383 F.2d 936, 941 (1967), apparently envisioned a two-step process in making a decision as to whether or not to allow impeachment. The first step would be a preliminary invocation of the court's discretion by defense counsel and a ruling on impeachment by the trial judge. If the defendant elected not to testify because of the fear of impeachment, the second step would be applied and the trial judge would make a determination of the fourth criteria under Luck, supra. The Gordon Court stated that the best way to make such an evaluation is

> "to have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross-examination before resolving the Luck issue."

Cf., Blakney f. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 21,231, decided May 2, 1968)

In this case, the trial court's decision to allow appellant to be impeached by his prior conviction for false pretenses prevented him from testifying (Tr. 74-75). The trial court, however, was never informed as to what appellant's testimony might be, either through a non-jury hearing or be a proffer by counsel. Clearly, the Court was in no position to make the informed evaluation, mentioned in Luck, by balancing the importance of appellant's testimony with the right of the jury to know about his prior conviction for false pretenses.

CONCLUSION

Because the cumulative errors in this case prevented the assertion of any affirmative defense, appellant respectfully requests that this Court reverse the judgment in this case and remand with instructions to grant a new trial, or for such other relief as to this Court may seem reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, two copies of the foregoing brief for appellant to the Office of the United States Attorney, Appellate Division, United States Court House, Washington, D.C. 20001, this _____ day of July, 1968.

David C. Niblack

REPLY BRIEF FOR APPELLANT

IN THE
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Attorney for Appellant
(Appointed by this Court)

ARGUMENT

THE GOVERNMENT IS IN ERROR IN ASSERTING THAT THE TRIAL COURT "REINSTATED" APPELLANT'S $1,500 BOND DURING TRIAL AND THAT APPELLANT SUFFERED NO PREJUDICE FROM HIS FAILURE TO OBTAIN AN ESSENTIAL WITNESS BECAUSE HE WAS INCARCERATED DURING TRIAL.

In its brief, the Government asserts that the real issue in this case is:

> "Whether the trial judge's reinstating the $1,500 bond, which the appellant had violated, so precluded his defense that appellant was denied due process of law." Brief for Appellee, page 4

The Government's only assertion to substantiate its claim that appellant suffered no prejudice from the Court's failure to release him to locate a witness is that there has been no proffer as to what the missing witness would say. The Government claims that no such proffer was made in appellant's motion for a new trial.

The facts available in the record indicate that appellant's bond was not revoked, but rather he was surrendered by the bondsman who had posted the required amount of money with the Court.[1/] Appellant's $1,500 bond remained in effect. It would have been unrealistic to expect that the same bondsman who had surrendered appellant to be relieved of financial liability would the next day accept an additional premium to take out appellant on the same bond.

The Government should also be aware that appellant's motion for a new trial was based not upon the issue of bond which had already been briefed in this Court, but upon the chance discovery of testimony

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1/ See next page.

offered by a Government witness in a criminal trial in the United States District Court for the District of Maryland. In its opposition to appellant's motion for a new trial, the Government stated:

> "It has been brought to the attention of the Government by letter dated May 2, 1968 from the United States Attorney's Office in Baltimore that one Charles F. Frazier was convicted in Baltimore, after defendant's conviction in the instant case, on check forging charges, stemming from the same scheme in which Mr. Bright was a participant. One of the confederates of Mr. Frazier was Edward S. McCray, who testified for the Government. Mr. McCray's testimony revealed that he passed two checks in Washington on September 29, one at the Liberty Bank and the other at another bank. It is the belief of the United States Attorney's Office in Baltimore that the check passed on September 29 at the Liberty Bank by McCray is the same check which serves as the basis for counts 1-3 of the indictment against Mr. Bright. It is also the belief of the United States Attorney's Office in Baltimore that Bright did successfully utter a forged check at the Liberty Bank on September 30, for which he was not charged and was attempting to utter a second check when his efforts were aborted and he was arrested while fleeing from the bank." 2/

The Government went on to question the reliability of Mr. McCray in its opposition to the motion.

At the least, the Government's assertion that appellant suffered no prejudice by the lack of the proposed witness is disingenuous.

1/ The curious description of the events of Thursday July 27, 1966, concerning appellant's actions found at page 3 of appellee's brief is found in no record before this Court or available to appellant.

2/ Appellant's motion for a new trial was denied on August 29, 1969, by the Honorable Howard F. Corcoran. In a memorandum denying the motion Judge Corcoran stated that the strength of the Government's case as to Counts 4 and 5 of appellant's indictment would cast "serious and substantial doubt" whether appellant would be able secure an acquittal on those counts if the Government severed them from counts 1-3. Appellant received a concurrent sentence on all counts.

Clearly, the errors asserted in this case so contaminated the trial in this case that appellant should be granted a new trial as to all counts of the indictment.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing reply brief for appellant was delivered by hand to the Office of the United States Attorney, Appellate Division, United States Court House, Washington, D.C., this 15th day of December 1969.

David C. Niblack